IN THE

Supreme Court of the United States

OCTOBER TERM 1940

BAKERY AND PASTRY DRIVERS AND HELPERS LOCAL 802 of the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, PETER SULLIVAN, individually and as President of the said Union PADDY SULLIVAN, individually and as an officer of the said Union, and HYMAN BERNSTEIN, individually and as business agent of said Union, all of 265 West 14th Street, New York City,

Petitioners,

against

HYMAN WOHL and LOUIS PLATZMAN,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. Opinions of Courts Below

The Supreme Court of the State of New York made findings of fact and conclusions of law (R. 46-60) and rendered an opinion in writing (14 N. Y. Supp. [2nd] 198; no official report) (R. 179, 180). The majority of the Appellate Division of the Supreme Court of the State of New York, First Department, wrote no opinion. The minority opinion was written by Mr. Justice Callahan, Mr. Justice Dore concurring (259 App. Div. 868, 19 N. Y. Supp. [2nd] 811) (R. 189, 190). The Court of Appeals of the State of New York wrote no opinion (284 N. Y. 220).

II. Jurisdiction

The statutory provision believed to sustain the jurisdiction of this Court to review the judgment of the Court of Appeals of the State of New York is Section 237-b of the Judicial Code of the United States (Title 28, U. S. C., Sec. 344-b).

Date of Entry of Judgment to be Reviewed

The judgment of the Court of Appeals of the State of New York here sought to be reviewed was entered on December 31, 1940. The petition is timely within the requirements of Section 243 of the Judicial Code of the United States (Title 28, U. S. C., Sec. 350).

III. Statement of the Case

A summary statement of the facts has already been made in the preceding petition for certiorari, pages 2-7, which in the interest of brevity is hereby adopted and made a part of this brief.

IV. Specification of Errors to be Urged

The Court of Appeals of the State of New York erred in holding that an absolute injunction against peaceful and orderly picketing could properly issue merely because no employment relationship existed between the members of the defendant Union and the peddlers and wholesale and retail bakers. This holding necessarily violated the constitutional guarantee of freedom of speech and assembly, for there was no local question involved which furnished a basis for deciding the case without reference to the Federal question. If in any respect the activities in ques-

tion exceeded the bounds of the area of freedom of speech and assembly guaranteed by the Constitution, the State Court should have separated the illicit conduct from the licit, and enjoined the former while protecting the latter. There was no justification, however, for the issuance of an indiscriminate blanket injunction. Such is the single but fundamental error here urged.

V. Summary of Argument

A) The injunction issued by the State Court violated the constitutional guarantee of freedom of speech and assembly.

1) The activity in question consisted solely of the peaceful and orderly dissemination of the opinions of the defendant Union.

2) Restraint of such activity by judicial decree as well as by statute is forbidden by the decisions of this Court.

B) There was no local question involved which furnished a basis for deciding this case without reference to the Federal question.

VI. ARGUMENT

A) The injunction issued by the State Court violated the constitutional guarantee of freedom of speech and assembly.

1) The activity in question consisted solely of the peaceful and orderly dissemination of the opinions of the defendant union.

There was no dispute whatever with respect to the peaceful and orderly character of the picketing conducted by the defendants in protest against the peddler system. As has been noted in the statement of facts set forth in the

petition for certiorari hereunto annexed, the Trial Court specifically found:

> "That the picketing so conducted aforementioned was done in a peaceful and orderly manner, without violence or threat thereof and in no respect was it or did it create disorder" (R. 58).

As to the duration of the picketing, the Court found:

> "That the picketing aforementioned lasted less than two hours" (R. 57).

As to the number of persons engaged in picketing, the Court found:

> "That at neither of the times aforementioned when picketing was conducted was there more than two pickets in the vicinity of the place of business of the Diamond Baking Co., Inc., and there was but one picket at the time that picketing was conducted in the vicinity of the place of business of Bernstein & Dickerman" (R. 58).

As to the truthfulness of the placards carried by the pickets, the Court found:

> "That the aforementioned placards were truthful in all respects and contained no misstatements or misrepresentations" (R. 58).

As to the interference with customers or members of the public, the Court found:

> "It was not established and there was no evidence that any customers of the Diamond Bakery Co., Inc. or Bernstein & Dickerman turned away and failed to deal with such firms by reason of said picketing" (R. 58).

As to damage suffered by the plaintiffs, the Court found:

> "That neither of the plaintiffs established or even offered evidence showing or tending to show that they sustained monetary loss to any extent" (R. 59).

As to the direct, legitimate and substantial economic interest which the Union had in the subject of the controversy, which it sought to protect by publicly protesting against the maintenance and extension of the peddler system, the Court found:

> "That 'peddlers' or independent jobbers are not covered by Workmen's Compensation Insurance, Social Security or Unemployment Insurance, and that an employer who changes his method of distribution from using employee drivers to 'peddlers' or independent jobbers saves considerable by way of premiums and taxes" (R. 52).
>
> "That if those who are presently employers and parties to contracts with the unions upon the expiration of those contracts, to survive, are required to adopt the 'peddler' system of distribution, then the wages, hours, working conditions, six-day week, etc., attained by the union after long years of struggle will be destroyed and lost" (R. 52).

None of these findings was altered in a single respect by the Appellate Division of the Supreme Court, or by the Court of Appeals, and there can be no question that they truly set forth the facts of this case.

In view of these facts, the issues presented to the State Courts were necessarily narrow. There were but two basic questions: First, whether a statutory labor dispute existed. If this were found, it would require dismissal of the complaint, for there was failure to comply with the prescribed procedure. Second, whether in the absence of a statutory labor dispute under New York State law, the conduct in question was nevertheless lawful and constitutionally immune from injunctive restraint.

It is apparent that the decision of the first question could not determine the case unless the decision were in favor of the defendants, as the State Court would still have to pass on the fundamental constitutional question. The State Court in rendering judgment in favor of the plain-

tiffs therefore necessarily decided both questions against the defendants.

We are not here concerned with the first question. The issue before this Court is limited to the second question.

2) The constitutional guarantees here invoked.

The injunction issued by the New York State Supreme Court was in direct contravention of the Fourteenth Amendment to the Constitution of the United States in that thereby the State of New York was enforcing a law which abridged the privileges and immunities of the defendants as citizens of the United States and in that thereby the defendants were deprived of liberty without due process of law.

3) The decision of the New York State Court of Appeals is inconsistent with the decisions of this Court.

No element can be found in the case at bar which justifies departure from the rules laid down by this Court in *Milk Wagon Drivers Union* v. *Meadowmoor Dairies* (No. 1, October Term, 1940) and *American Federation of Labor* v. *Swing* (No. 56, October Term, 1940).

As is shown by the statement of facts set forth in the petition for certiorari annexed hereto, which we have incorporated in this brief by reference, the "peddler system" in the bakery industry in New York City is substantially identical with the "vendor system" in the dairy industry in Chicago, which was described in detail and analyzed by this Court in *Milk Wagon Drivers Union* v. *Lake Valley Farm Products, Inc.* (311 U. S. 91).

In that case, as in this, the Union protested against the maintenance and extension of an arrangement whereby employers who had formerly distributed their products through their own employees, engaged pursuant to the orthodox employment relationship, discharged their employees and effected distribution by means of "peddlers" or "vendors". In that case, as in this, it appeared that

with the spread of the new system of distribution Union standards would necessarily suffer. In that case, as in this, the Union attempted to unionize the peddlers, and, failing this, conducted picketing at the places where the peddlers did business. There was but one vital distinction between the two cases, to wit, that in the *Milk Wagon Drivers* case the Union committed acts of violence, whereas in the case at bar the activities of the defendants were utterly peaceful.

Although we have referred to *Milk Wagon Drivers Union* v. *Lake Valley Farm Products, Inc.* (311 U. S. 91) because of the similarity of the facts involved, we do not rely upon it as a controlling authority, for we recognize that the primary question there presented was the applicability of the Norris-LaGuardia Act, which does not confront us here. The same facts, however, came once more before this Court in the second *Milk Wagon Drivers* case, *Milk Wagon Drivers Local 753* v. *Meadowmoor Dairies, Inc.*, and the latter case bears directly upon the issues with which we are concerned.

In passing upon the power of the Illinois Supreme Court to issue an injunction against peaceful picketing, this Court, in the second *Milk Wagon Drivers* case, upheld the injunction only upon the limited ground that a definite finding had been made that the extreme violence which had been practiced so thoroughly permeated all of the conduct of the defendants that subsequent peaceful acts would necessarily be tainted thereby and would continue to have a coercive effect. The conduct of the defendants was described as follows:

> "The picketing in this case was set in a background of violence. In such a setting it could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful. So the Supreme Court of Illinois found. We cannot say that such a finding so contradicted experience as to warrant our rejection."

The Court definitely indicated, however, that, except for such background of violence, the injunction of the Illinois Supreme Court would have been held to violate the Fourteenth Amendment.

> "The injunction which we sustain is 'permanent' only for the temporary period for which it may last. It is justified only by the violence that induced it and only so long as it counteracts a continuing intimidation."

The precise issue here involved was before this Court in the recent case of *American Federation of Labor* v. *Swing* (No. 56, October Term, 1940). In its opinion the Court stated the issue as follows:

> "Is the Constitutional guarantee of freedom of discussion infringed by the common law policy of a state forbidding resort to peaceful persuasion through picketing merely because there is no immediate employer-employee dispute?"

Although in the *Swing* case there was a claim that the defendants' placards were libelous, and that the defendants had committed acts of violence, the Court nevertheless struck down the injunction because it failed to except acts of peaceful persuasion.

The case at bar must be governed by the principle definitely enunciated in the *Swing* case that "The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state", unless this Court is willing to recognize an exception based on no more tangible a distinction than the peculiar nature of the peddler system.

The activities of the defendants in question consisted solely of the following courses of conduct:

1) Carrying of placards in public places reading as follows:

"HYMAN WOHL

A BAKERY ROUTE DRIVER WORKS SEVEN DAYS A WEEK WE ASK EMPLOYMENT FOR A UNION RELIEF MAN FOR ONE DAY HELP US SPREAD EMPLOYMENT & MAINTAIN A UNION WAGE HOUR AND CONDITION.

BAKERY & PASTRY DRIVERS & HELPERS
LOCAL 802 I. B. of T. affiliated
with A. F. L." (R. 57)

2) Requesting about five retail dealers in bakery products, who were customers of the plaintiffs, not to deal with the plaintiffs unless the plaintiffs would conform to the established Union standards (R. 58, 59).

3) Requesting Diamond Baking Co., Inc. and Bernstein & Dickerman, the two wholesale bakers who distributed their products through the plaintiff peddlers, not to continue such method of distribution unless the plaintiffs would conform to Union standards (R. 48, 49).

The legal propriety of each of these courses of conduct is clear.

1) The carrying of the placards was conduct immune from statutory or judicial restraint under the decisions of this Court in *Thornhill* v. *Alabama, Carlson* v. *California* and *American Federation of Labor* v. *Swing.*

2) The request made to the retail dealers in bakery products was similar to the activity of the Union involved in the cases of *Milk Wagon Drivers* v. *Lake Valley Farm Products, Inc.* and *Milk Wagon Drivers* v. *Meadowmoor Dairies, Inc.,* except that in the case at bar no violence or threat thereof was involved. The findings of fact of the Trial Court show that no suggestion of pressure other than a lawful appeal to the public was ever made by the defendants. The defendants merely informed the retail dealers of the Union's policy in regard to the peddler

system and stated that a picket with a placard in the form above quoted would be placed in the neighborhood if the Union's request was denied:

> "That on the 25th day of January 1939, a member of the defendant union followed plaintiff Platzman as he was distributing his products, and went into two or three places of business of said plaintiff's customers and advised one of said customers that the union was seeking to persuade the plaintiff to work but six days per week and employ a union driver as a relief man, and further stated to the said one customer that in the event he continued to purchase from plaintiff Platzman, that on the following day a picket would be placed in the vicinity of said store with a placard reading as heretofore set forth" (R. 58, 59).

Since the placard was unobjectionable, and the parading thereof was a lawful act, the threat to carry the placard in public places was necessarily lawful, for that which may lawfully be done may lawfully be threatened.

3) What has been said with regard to item 2 applies with equal force to item 3. The requests made to the wholesale bakers, Diamond Baking Co., Inc. and Bernstein & Dickerman, were the same as those made to the retail dealers. It was not suggested in any instance that the penalty to be suffered by the wholesalers for refusal would be other than lawful picketing with the placards above described (R. 48, 49).

The conclusion is inevitable that in restraining the conduct aforesaid the Courts of the State of New York were violating the rights of the defendants guaranteed by the Constitution of the United States.

We believe it to be of the utmost importance that this Court clearly rule that the holding of the *Swing* case is applicable to situations involving peddler and vendor systems, so that chaotic industrial conditions may not ensue in the many fields where employers are now experimenting with such systems. As has been indicated in the accompanying petition, the question is of national importance

because, as will be judicially noticed, the vital interests of industry and of labor cut across State lines, and the establishment of a peddler system in one State definitely affects labor relations in other States. Divergent views on the part of various State Courts with respect to this Federal question are, therefore, from any broad view of the general welfare, utterly intolerable.

B) There was no local question involved which furnished a basis for deciding this case without reference to the Federal question.

As has been noted, there were but two issues presented to the New York State Courts:

1) Whether a statutory labor dispute was involved.

2) Whether in the absence of a statutory dispute the peaceful activities of the defendants were subject to injunctive restraint.

We have already pointed out that decision of the first question, unless in favor of the defendants, could not be determinative of the case, so that the State Courts necessarily had to pass upon the second question, which was essentially a Federal question, in order to arrive at a decision in favor of the plaintiffs.

It is, therefore, of no consequence, so far as the granting of the writ requested is concerned, that none of the New York State Courts discussed the constitutional question in any written opinion. The only opinions written were those of the Trial Court and of the minority of the Court in the Appellate Division. Neither the majority of the Appellate Division of the Supreme Court nor the Court of Appeals ventured to express in writing the opinions which grounded their decisions. This reluctance to give articulate expression to judicial rationale may not be permitted, however, to obliterate the defendants' constitutional

rights, for it has been demonstrated that, albeit silently, the question at issue was necessary resolved.

The defendants did not fail to remind the New York State Courts of the existence of the constitutional question.

In the Trial Court the issue was specifically raised by the defendants' answer, which alleged that the defendants "acted wholly within their constitutional rights" (R. 13).

The question was again raised in the briefs submitted by the defendants to both the Appellate Division of the Supreme Court and the Court of Appeals.

In presenting the case to the Court of Appeals we argued in our written brief in the following language:

> "The appellants respectfully submit that the absolute injunction granted herein by the lower Court, in a case where it was conceded that no damage was done by the defendants, and where it plainly appeared that the defendants had just cause for engaging in the activities in question, was a serious violation of the rights of freedom of speech and assembly guaranteed by the Federal Constitution."

Hague v. *C. I. O.* (307 U. S. 496), *Thornhill* v. *Alabama* (310 U. S. 88) and *Carlson* v. *California* (310 U. S. 106) were cited by us in support of that argument. The above quoted paragraph from our brief in the Court of Appeals was in identical language included in the brief submitted to the Appellate Division. There was obviously no laxity on the part of the defendants in asserting their constitutional rights, privileges and immunities.

The reference to the establishment of the "law of the case" as the ground for its decision, contained in the opinion of the Trial Court, is not, apart from any question as to its correctness as a matter of State law, significant here. As the opinion definitely recites, the decision made upon the previous motion for a temporary injunction held merely that "a labor dispute was not involved". This, as we have seen, could not determine the entire case, unless

the decision was in favor of the defendants. It is, therefore, immaterial here whether the defendants adequately preserved their rights with respect to the existence of a statutory labor dispute under New York law.

No other factors were present in the case which would justify elimination of the Federal question. The plaintiffs admitted that the defendants' conduct was free from violence, disorder or fraud. We have recited the facts in detail in this brief and in the accompanying petition, and it is respectfully submitted that no other element of illegal conduct on the part of the defendants, sufficient to justify a total injunction, existed. The plaintiffs have at various points in the progress of this case applied the epithet of "secondary boycott" to the defendants' conduct. As to this, we say that within the rulings of the Court in the second *Milk Wagon Drivers* case and the *Swing* case, it is clear that no illegal boycott was here involved. We do not halt at this point, however, but we proceed further and say that, even if in any respect the conduct of the defendants was overzealous to such an extent that it might properly be characterized as constituting an improper boycott, this furnished no ground for a total injunction. Even under such circumstances the State Courts were under a duty to separate the lawful from the unlawful, and to restrain only the latter.

CONCLUSION

The writ of certiorari requested by the petitioners should be granted, the judgment of the Court of Appeals of the State of New York should be reviewed by this Court, and the said judgment should be reversed.

Respectfully submitted,

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